In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-240

JOHN R. BRIGHT, ET AL., PETITIONERS

v.

MELVIN R. LAIRD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners, members of the United States Air Force Reserve serving on active duty (R. 2) [1], brought this action in the United States District Court for the Northern District of California, seeking an injunction against the enforcement of a general order of the Air Force prohibiting the wearing of Air Force uniforms in public under certain circumstances [2] and a declara-

[1] "R." refers to the record before the court of appeals.

[2] The order, issued in October 1968 by the Secretary of the Air Force, provides:

"Recent developments have established a need for clarification of the circumstances in which Air Force members are not permitted to wear their uniform. Accordingly, pursuant to para 1-10d, AFM 35-10, 26 June 1968, the Secretary of the Air

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tory judgment that the order is unconstitutional on its face (R. 1–8).

Petitioners alleged in their complaint that they and others similarly situated had planned on attending various demonstrations in uniform, but had been deterred from doing so by the challenged regulation (R. 5). Joining petitioners as a plaintiff below was reservist Michael Locks, who had attended one of the demonstrations in uniform and had been convicted by a general court martial for violating the regulation (R. 2). Locks, whose military appeal from the conviction is pending (R. 3–4; Pet. App. ii), did not join in this petition for a writ of certiorari.

The district court held that petitioners had stated a "controversy" [3] and thus were entitled to an adjudication of their claims, but denied relief on the merits (Pet. App. xi–xix).[4] The court of appeals affirmed

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Force has specified that Air Force members will not wear the uniform at any public meeting, demonstration, or interview if they have reason to know that a purpose of the meeting, demonstration, or interview is the advocacy, expression or approval of opposition to the employment or use of the Armed Forces of the United States."

[3] The court dismissed the complaint as to Locks on the grounds that his challenge to the regulation was the subject of a military appeal from his court martial conviction (Pet. App. x–xi).

[4] In an order amending its initial opinion, the district court held that it had jurisdiction of the case under 28 U.S.C. 2241 (Pet. App. xx–xxi). But as petitioners are not in custody for having violated the regulation and are not seeking discharge from the Air Force, there would appear to be no basis for invoking the habeas corpus jurisdictional statute. As the only other basis for jurisdiction is 28 U.S.C. 1331 (federal question jurisdiction) and as petitioners have only alleged but

without reaching the merits on the grounds that petitioners had failed to show that they were being irreparably harmed by the existence of the regulation, that the regulation was promulgated in bad faith or that resort to the military judicial system will be futile (Pet. App. v). One judge dissented, reaching the merits and expressing the view that the regulation was unconstitutional under *Schacht* v. *United States*, 398 U.S. 58.

2. The decision of the court of appeals is correct and conflicts with no decision of this Court or any other court of appeals. Accordingly, review by this Court is unwarranted.

As a general rule, "equity will not interfere with the criminal processes, by entertaining actions for injunction or declaratory relief in advance of criminal prosecution." *Zemel* v. *Rusk*, 381 U.S. 1, 19. While this Court has sometimes denied such extraordinary relief on the ground that no "case or controversy" had been made out (*International Longshoremen's and Warehousemen's Union* v. *Boyd*, 347 U.S. 222; see *Zemel* v. *Rusk*, *supra*, 381 U.S. at 19–20), relief may also be denied in causes involving a "case or controversy." See Younger →

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have not shown that the amount in controversy exceeds $10,000 (R. 2), the case should be remanded to the district court for proof of the $10,000 allegation in the event the Court concludes that petitioners are otherwise entitled to maintain the action. See *Oestereich* v. *Selective Service Board*, 393 U.S. 223, 239; see also our brief on the merits in *Fein* v. *Selective Service System Local Board No. 7*, No. 70–58, pp. 56–61. We are providing petitioners' counsel with a copy of this brief.

er v. *Harris,* 401 U.S. 37, 52–53. That the courts are not compelled by the Declaratory Judgment Act, 28 U.S.C. 2201, to "declare the rights and other legal relations" of a party in every actual controversy is clear. See *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237, 241. Thus, even assuming petitioners have made out a "controversy" in the instant case by alleging that they would have been prosecuted under the Air Force uniform regulation had they attended certain public demonstrations, compare *United Public Workers* v. *Mitchell,* 330 U.S. 75, that factor alone would not entitle them to relief. As petitioners have not pointed to any other extraordinary factors which might warrant intervention, their complaint must fail.

Apart from the general reluctance to interfere with criminal processes, there is another compelling factor which mandates against permitting petitioners to challenge the Air Force regulation in this case. Although this case does not involve the principles of federalism which underlie this Court's delimitation in *Younger* v. *Harris, supra,* and *Samuels* v. *Mackell,* 401 U.S. 66, of the circumstances under which federal courts may interfere with state proceedings, analogous considerations have led the Court to refrain from interfering prematurely with matters within the competence of the military judicial system. See *Noyd* v. *Boyd,* 395 U.S. 683, 694; cf. *Beard* v. *Stahr,* 370 U.S. 41; *Gusik* v. *Schilder,* 340 U.S. 128, 131–132. See our brief on the merits in *Parisi* v. *Davidson,* No. 70–91,

pp. 11–17.[5] As there has been no claim that the Air Force is enforcing its uniform regulation in bad faith (cf. *Cameron* v. *Johnson*, 390 U.S. 611), and as the military courts are fully empowered to consider any constitutional claims raised as defenses to prosecutions brought under that regulation (see *Burns* v. *Wilson*, 346 U.S. 137, 142), the granting of injunctive or declaratory relief by the federal courts in this case would unduly interfere with the administration of military justice. This conclusion is particularly justified where, as here, the very constitutional claims[6] asserted are presently under consideration by a military appellate court (see p. 2, *supra*).

3. Petitioners' reliance on *Wisconsin* v. *Constantineau*, 400 U.S. 433, for the proposition that restraint from interfering with military justice is inappropriate here is unfounded. In that case, a local police chief, pursuant to a state statute, had caused notices to be posted in public impugning Constantineau's good name and reputation without notice or an opportunity to be heard. Under such circumstances, federal judicial intervention was deemed appropriate. Here, no action whatsoever has been taken against petitioners.

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[5] We are supplying petitioners' counsel with a copy of this brief.

[6] While we do not deem it necessary to discuss the merits of petitioners' claims in this opposition, we note that those claims present novel questions concerning the power of the military to control the circumstances under which military personnel may appear in public in uniform. In this light, *Schacht* v. *United States*, *supra*—dealing with the wearing of military uniforms by non-military personnel in theatrical productions—is not controlling.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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